No. 76-287

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

G. L. (PETE) HOWELL, ET AL., *Appellants*

vs.

MANUEL DeBUSK, ET AL., *Appellees*

On appeal from the United States District Court
for the Northern District of Texas, Dallas Division

Appellants' Reply Brief

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In their Motion to Affirm, Appellees have charged Appellants with a "tortured construction" of the challenged statute; Appellants now charge Appellees with a "tortured construction" of the doctrine of *res judicata*.

Several years ago a certain Fort Worth lawyer used to regale his friends with the story of a colleague who had compromised and settled a negligence case for a family of three involved in an automobile collision. After the settlement check had been cashed and spent, the plaintiffs discovered that there was no mention of the baby in the releases which had been signed, so

they hurried back to their lawyer, demanding that he "try the baby case."

Now, it appears that the Attorney General has been prevailed upon by his clients to "try the baby case," because they think they have found a flaw in the compromise settlement agreement of February 3, 1972 (Appendix G, Jurisdictional Statement). But this baby, like the mule, is without either pride of ancestry or hope of progeny. Nevertheless, the foundling has been presented to the Supreme Court of the United States for adoption.

"Appellants are . . . attempting to construe the . . . order," Appellees complain on page 3 of their Motion, "as an eternal freeze of the State's ability to control access to party primary ballots!"

If Appellants have committed error in construing the two orders which the three-judge *Carter* court entered in the case of *Johnston v. Luna*, 338 F.Supp. 355 (1972), on February 2, 1972 (Appendix F, Jurisdictional Statement) and February 8, 1972 (Appendix H, Jurisdictional Statement) as authorization and approval of a compromise settlement agreement, they are in distinguished company, because a three-judge Federal District Court for the Northern District of Georgia, in a per curiam opinion dated May 4, 1972, had this to say in the case of *Stoner v. Fortson*, 359 F.Supp. 579 (1972), at page 585:

> The three-judge district court in Texas which gave effect to Bullock v. Carter, authorized the state election officials to set rules and regulations *commensurate with the holding of the Supreme*

> *Court in that case* (emphasis added). Qualifying fees were thereafter set in range with a maximum of $400. An alternative method of qualifying by petition . . . was also set. Johnston v. Bullock (sic), N. D. Texas, Civil Action No. 3-5373-C.

Table I, page 10, of this brief, shows the 1976 schedule of filing fees involved in the present constitutional challenge, as compared with the 1974 schedule of filing fees and the 1972 schedule of filing fees. This same table was attached to Plaintiff's Original Complaint in the trial court as Exhibit "C".

To induce the three-judge *Carter* court to approve the 1972 schedule of ballot access requirements in the *Johnston* case, the Secretary of State incorporated the following conclusion into his order of February 3, 1972 (Appendix G, Jurisdictional Statement):

> The Secretary of State concludes that the following fee schedule with a nominating petition as an alternative to the fee satisfies the state interest in regulating the ballot without placing a wealth requirement upon candidacy in Texas.

If the doctrine of *res judicata* does not apply an "eternal freeze" to the 1972 schedule, then the conclusion of the Secretary of State is at least a judicial admission against interest by a party to the litigation which needed to be overcome by the State at the trial of this cause with evidence of such a material change of circumstances that an escalation of ballot access requirements over those required by the 1972 schedule would be justified. No such evidence was offered.

The United States Court of Appeals for the Tenth Circuit, on June 3, 1976, decided the case of *Gallagher v. Evans*, 536 F. 2d 899 (1976), which had not appeared in the advance sheets at the time Appellants prepared their Jurisdictional Statement in the instant case.

The plaintiffs in the *Gallagher* case were candidates for various offices in the June 6, 1972, New Mexico primary election, who had paid certain statutory filing fees under protest and sued the Secretary of State for refund of their money, alleging the statute to be unconstitutional. The three-judge Federal District Court ruled for the Secretary of State and the plaintiffs appealed. The Tenth Circuit reversed and remanded. Circuit Judge Breitenstein, speaking for the Court of Appeals, ruled as follows:

> "[4] * * * The constitutionality of § 3-8-26 was attacked in *Dillon v. Fiorina*, D.N.Mex., 340 F.Supp. 729, by a candidate for nomination to the office of United States Senator. On March 24, 1972, a three-judge federal district court held that the fee was indistinguishable from the fees struck down in *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92, and declared that the statute "is unconstitutional as it applies to the office of United States Senator," 340 F.Supp. at 730. * * *
>
> "To sustain the statute the defendant asserts that the fees are reasonable. . . .
>
> "[5] We have no reason to explore the reasonableness of the New Mexico statute. . . . The three-judge federal district court found the statute unconstitutional as applied to candidates for

> the office of United States Senator and enjoined its enforcement against them. That decision was not appealed. . . .
>
> * * *
>
> "The defendant Secretary of State would have us enforce a law as to several classes of persons when that law had been declared unconstitutional as applied to another class of persons. This discriminatory treatment would deny the plaintiffs equal protection of the laws in violation of the Fourteenth Amendment.
>
> "[6, 7] The construction of a constitutional provision must be uniform. See 1 Cooley on Constitutional Limitations, 1927 ed., 123-124, citing, inter alia, *Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691 and *South Carolina v. United States*, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261. A valid statute may become invalid by change in conditions to which it is applied. *Nashville, Chattanooga & St. Louis Railways v. Walters*, 294 U.S. 405, 415, 55 S.Ct. 486, 79 L.Ed. 949, and *Abie State Bank v. Bryan*, 282 U.S. 765, 772, 51 S.Ct. 252, 75 L.Ed. 690. Here we have a change in conditions resulting from the federal district court decision that the candidates for the United State Senate do not have to pay the fee.
>
> "All the candidates should be treated the same. The plaintiffs are entitled to recover the fees which they paid under protest and which are held in a suspense fund awaiting the outcome of this litigation.
>
> "Reversed and remanded for further proceedings in the light of this opinion."

Should the Appellants be mistaken in their belief that the doctrine of *res judicata* applies to the judg-

ment of the three-judge *Carter* and *Johnston* court, dated February 8, 1972 (Appendix H, Jurisdictional Statement), then the attention of the Supreme Court is respectfully invited to Table II, page 11, entitled "Comparison of 1970-1976 Filing Fees."

"On March 24, 1972," according to Judge Breitenstein in the *Gallagher case*, "a three-judge federal district court held . . . [the New Mexico filing fee for United States Senator] indistinguishable from the fees struck down in *Bullock v. Carter*, 405 U.S. 134 . . ., and declared that the statute is unconstitutional as it applies to the office of United States Senator."

In the case at bar, not only is the 1976 filing fee for United States Senator "indistinguishable from the fees struck down in *Bullock v. Carter*," there are several challenged filing fees, including that for United States Senator, which are "indistinguishable" *because they are the very same fees struck down by the Supreme Court in the Bullock case over 4 years ago!*

An inspection of Table II, page 11, reveals that out of 50 offices printed on the May 2, 1970, Democratic Primary Election ballot for Tarrant County, Texas, 9 of those offices (or 18%) had higher filing fees in 1976 than in 1970, and 21 offices (or 42%) had exactly the same filing fees in 1976 as in 1970, while only 20 offices (or 40%) had lower filing fees in 1976 than in 1970. In other words, for 60% of the offices on this ballot the 1976 filing fee was either still the same, *or even higher*, than the 1970 filing fee, in spite of the fact that the Supreme Court of the

United States, on February 24, 1972, in a unanimous opinion written by Mr. Chief Justice Burger, declared the 1970 Texas filing fees to be "patently exclusionary" and unconstitutional. See *Bullock v. Carter*, 405 U.S. 134 (1972).

Appellants respectfully suggest that there should be an "eternal freeze" of these outlawed filing fees at some point, and that if the doctrine of *res judicata* does not apply to the order which the three-judge *Carter* court entered in the case of *Johnston v. Luna*, 338 F.Supp. 355 (1972), on February 8, 1972 (Appendix H, Jurisdictional Statement), then at least *res judicata* should apply to the unanimous opinion of the Supreme Court of the United States, entered in the case of *Bullock v. Carter*, 405 U.S. 134 (1972), on February 24, 1972.

As Mr. Justice Frankfurter said in *Angel v. Bullington*, 330 U.S. 183, 192-193 (1947):

> "The first litigation raised and adjudicated federal issues every one of which is again involved in the second suit. * * * If tolerated, our federal system would afford fine opportunities for needlessly multiplying litigation in this way. The doctrine of *res judicata* is a barrier against it. Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of *res judicata* reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. Compare, *e. g.*, *Hazel-Atlas Co. v. Hartford*

Co., 322 U. S. 238, 244. And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties. *Chicot County Dist. v. Bank*, 308 U.S. 371.

Judgment reversed.

Wherefore, premises considered, Appellants pray for an application of the doctrine of *res judicata* as to all issues of fact and of law previously determined by final judgment of a court of competent jurisdiction, whether relating to filing fees or alternative nominating petitions, as ancillary to the consideration of any judgment on the merits of this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, A. L. Crouch, attorney for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the.....day of October, 1976, I served a copy of the foregoing Appellants' Reply Brief on Appellees by depositing a copy in the United States mail, postage prepaid, and addressed to the attorneys of record for said Appellees as follows: John L. Hill, Attorney General of Texas, and David M. Kendall, First Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, attorneys for appellees Briscoe, White and Hill; and Mr. Earl Luna, 1002 Dresser Building, 1505 Elm Street, Dallas, Texas, 75201, attorney for appellees DeBusk, Guest and McDonald.

I further certify that I have mailed a copy of same to Mr. Ronald W. Kessler, successor Chairman of Dallas County Democratic Executive Committee, Metropolitan Federal Savings Bldg., 1407 Main Street, Dallas, Texas, 75202, *pro se*, ex-officio successor Appellee, and to Ms. Janet L. Shafer, 1536 Bilco Street, Dallas, Texas, 75232, *pro se*.

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TABLE I.

1976 FILING FEES AND 1974 FILING FEES, AS COMPARED WITH 1972 FILING FEES ESTABLISHED BY SECRETARY OF STATE BOB BULLOCK "PURSUANT TO THE JUDGMENT OF THE COURT"

	1972[1]	1974[2]	1976[3]
a. All statewide offices	$400	$1,000	$1,000
b. United States Representative	300	500	1,000
c. State Senator	150	400	600
d. State Representative	100	200	300
e. Member, State Board of Education	50	50	100
f. Chief Justice or Associate Justice, Court of Civil Appeals	100	400	500
g. District Judge or judge of any other Court having status of district office	100	400	500
h. District Attorney or Criminal District Attorney	100	400	500
i. All County offices, as classified in Art. 6.05a, Texas Election Code, except surveyor or inspector of hides and animals	100	150	200
j. County Surveyor or Inspector of Hides and Animals	50	50	100
k. County Commissioner	50*	100*	
Counties of 200,000 or more inhabitants			500
Counties of under 200,000 inhabitants			200
l. Justice of the Peace or Constable			
For Counties above 200,000 population	50	100	400
For Counties under 200,000 population	25	50	150
m. Public Weigher	None	50	100
n. For all party offices	None	None	None

1. As fixed by order of the Secretary of State, dated February 3, 1972 (Appendix G, Jurisdictional Statement), and approved by the **Carter** court in the case of **Johnston v. Luna,** 338 F. Supp. 355 (1972), by order dated February 8, 1972 (Appendix H, Jurisdictional Statement).

2. As fixed by Art. 13.08c-2 (Supp. 1973), Texas Election Code (Appendix I, Jurisdictional Statement).

3. As fixed by Art. 13.08 (Supp. 1975), Texas Election Code, (Appendix C, Jurisdictional Statement), which statute is being challenged in the case at bar.

*No population brackets specified. Any fee determined according to population would be an invidious discrimination against residents of populous counties in favor of residents of rural counties. See **Moore v. Ogilvie,** 394 U. S. 814 (1969).

TABLE II

COMPARISON OF 1970-1976 FILING FEES

A. STATEWIDE OFFICES

	1970[a]	1972[1]	1974[2]	1976[3]
1. United States Senator	$1,000	$400	$1,000	$1,000
2. Governor	1,000	400	1,000	1,000
3. Lieutenant Governor	1,000	400	1,000	1,000
4. Attorney General	1,000	400	1,000	1,000
5. Comptroller	1,000	400	1,000	1,000
6. Commissioner of Land Office	1,000	400	1,000	1,000
7. Agriculture Commissioner	1,000	400	1,000	1,000
8. Railroad Commissioner	1,000	400	1,000	1,000
Supreme Court				
9. Associate Justice, Place 1	1,000	400	1,000	1,000
10. Associate Justice, Place 2	1,000	400	1,000	1,000
11. Associate Justice, Place 3	1,000	400	1,000	1,000
Court of Criminal Appeals				
12. Chief Judge	1,000	400	1,000	1,000
13. Judge	1,000	400	1,000	1,000

B. CERTAIN TARRANT COUNTY OFFICES

District Offices

	1970	1972[1]	1974[2]	1976[3]
14. State Representative, Place 1	$ 300[b]	$100	$ 200	$ 300
15. State Representative, Place 2	300[b]	100	200	300
16. State Representative, Place 3	300[b]	100	200	300
17. State Representative, Place 4	300[b]	100	200	300
18. State Representative, Place 5	300[b]	100	200	300
19. State Representative, Place 6	300[b]	100	200	300
20. State Representative, Place 7	300[b]	100	200	300
21. State Representative, Place 8	300[b]	100	200	300
1. State Senator, Place 10	300[b]	150	400	600
2. State Senator, Place 12	300[b]	150	400	600
3. Board of Education, Place 1	50[c]	50	50	100

Local Offices

	1970[b]	1972[1]	1974[2]	1976[3]
4. County Surveyor	$ 50	$ 50	$ 50	$ 100
5. Public Weigher	50	None	50	100
6. Justice of the Peace, Place 4	50	50	100	400
7. Justice of the Peace, Place 5	125	50	100	400
8. Justice of the Peace, Place 6	300	50	100	400
9. Justice of the Peace, Place 7	50	50	100	400

a. As fixed by Art. 13.15, Texas Election Code, declared unconstitutional in the case of **Carter v. Dies,** 321 F. Supp. 1358 (1970), affirmed sub nom. **Bullock v. Carter,** 405 U.S. 134 (1972).

b. As assessed by the Tarrant County Democratic Executive Committee under the terms of Art. 13.08(1), Texas Election Code, declared unconstitutional in the case of **Carter v. Dies,** 321 F. Supp. 1358 (1970), affirmed sub nom. **Bullock v. Carter,** 405 U.S. 134 (1972). See Table I, Appellees' Brief, U.S. Supreme Court, page 42.

c. As fixed by Art. 13.08(4), Texas Election Code, declared unconstitutional in the case of **Carter v. Dies,** 321 F. Supp. 1358 (1970), affirmed sub nom. **Bullock v. Carter,** 405 U. S. 134, (1972).

1. See footnote 1, Table I.
2. See footnote 2, Table I.
3. See footnote 3, Table I.